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No. 80-415

In the Supreme Court of the United States

OCTOBER TERM, 1980

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
APPELLANT

v.

WILLIAM M. GIBBONS, TRUSTEE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE FEDERAL APPELLEES

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QUESTION PRESENTED

Whether the employee protection provisions of the Rock Island Railroad Transition and Employee Assistance Act, Pub. L. No. 96-254, 94 Stat. 399, as they existed prior to amendment by the Staggers Rail Act of 1980, Pub. L. No. 96-448 (Oct. 14, 1980), imposed an unconstitutional taking of property in violation of the Just Compensation Clause of the Fifth Amendment.

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OPINIONS BELOW

The district court's oral opinion (J.S. App. 5a-12a) and order (J.S. App. 13a-14a) of June 9, 1980, and its oral opinion (J.S. App. 15a-22a) of June 20, 1980, denying a motion for reconsideration, are not reported. The district court's order of October 15, 1980 (App. C, *infra*, 9a-13a), and minute order amending that order (App. D, *infra*, 14a), are not reported.

JURISDICTION

The district court's order holding unconstitutional portions of the Rock Island Railroad Transition and Employee Assistance Act, Pub. L. No. 96-254, 94 Stat. 399, and preliminarily enjoining enforcement of those portions of that Act, was entered on June 9, 1980. The notice of appeal was filed on June 11, 1980 (J.S. App. 23a), and the appeal was docketed on September 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

STATUTES INVOLVED

Sections 106 and 110 of the Rock Island Railroad Transition and Employee Assistance Act, as originally enacted, Pub. L. No. 96-254, 94 Stat. 401 and 403, are set forth at J.S. App. 1a-3a. Section 701 of the Staggers Rail Act of 1980, Pub. L. No. 96-448 (Oct. 14, 1980), which amends Section 106 and adds Section 124 to the Rock Island Railroad Transition and Employee Assistance Act, is set forth in Appendix A, *infra*, 1a-4a.

STATEMENT

1. In March 1975, after experiencing several years of financial deterioration, the Chicago, Rock Island and Pacific Railroad Company ("Rock Island") peti-

tioned the United States District Court for the Northern District of Illinois for reorganization under Section 77 of the Bankruptcy Act, 11 U.S.C. 205. The Rock Island continued to operate for more than four and a half years under the protection of Section 77. After a strike further damaged its financial posture, however, the Rock Island ceased all operations in September 1979.

In January 1980, the reorganization court directed the Trustee of the Rock Island to prepare a plan for its liquidation, and the Trustee began selling the assets of the railroad on a piecemeal basis. On June 2, 1980, the reorganization court authorized the Trustee to abandon the entire Rock Island system and ordered that no employee protection conditions be imposed.

On May 30, 1980, a few days before the reorganization court's abandonment order, the President signed into law the Rock Island Railroad Transition and Employee Assistance Act, Pub. L. No. 96-254, 94 Stat. 399 ("the Rock Island Act"). Sections 106 and 110 of the Rock Island Act, 94 Stat. 401 and 403 (J.S. App. 1a-3a) required the Trustee, through the use of high priority federal loans, to provide labor protection benefits of up to $75 million to employees of the Rock Island who might be adversely affected by its cessation of operations. Specifically, Section 106(b) of the Rock Island Act, 94 Stat. 401, ordered the Interstate Commerce Commission to impose a fair and equitable labor protection arrangement within 30 days unless, prior to that time, the railroad and labor organizations representing its employees were able to agree upon a satisfactory arrangement. Section 106(c), 94 Stat. 401, provided that the bankruptcy court should immediately direct the Trustee and the labor organizations to implement the arrange-

ment. Section 106(d), 94 Stat. 401, provided that orders of the Commission or of the bankruptcy court under Sections 106(b) and (c) could not be stayed and that these orders could be reviewed only in the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit was required to rule on any such appeal within 60 days, and its decision would not be subject to further review. Section 106 (e)(2), 94 Stat. 402, provided that labor protection claims would be treated as administrative expenses of the Rock Island estate.

Section 110 of the Rock Island Act required the Secretary of Transportation to guarantee obligations of the Rock Island for the purpose of providing employee protection under an agreement entered into under Section 106. It further provided that the guaranteed obligations would be treated as an administrative expense of the Rock Island estate and that the United States would incur no liability except in connection with those obligations. The amount guaranteed by the Secretary, and the liability of the Rock Island under a labor protection agreement, were limited to $75 million.

2. After the enactment of the Rock Island Act, the National Mediation Board offered its assistance in negotiating an employee protection agreement. The Rock Island Trustee, however, declined to participate in negotiations. On June 5, 1980, the Trustee, the indenture trustees under the mortgages of the Rock Island and representatives of certain creditor interests filed a complaint in the bankruptcy court seeking a judgment declaring the Rock Island Act unconstitutional and enjoining its enforcement. After a hearing on June 9, 1980, the district court entered a preliminary injunction enjoining the Commission, the Trustee, and the Secretary of Transportation from

fulfilling their obligations under Sections 106 and 110 of the Rock Island Act (J.S. App. 13a-14a).

The district court explained its reasons for issuing the injunction in an oral statement from the bench (J.S. App. 5a-12a). Although the court suggested that the statute might have other constitutional problems, it based its ruling on the fact that the labor protection provisions constituted an unconstitutional taking of the property rights of the creditors, in violation of the Just Compensation Clause of the Fifth Amendment (*id.* at 7a-8a). The court concluded that if the procedures of the labor protection provisions of the Rock Island Act were permitted to go forward, the creditors of the estate would suffer irreparable harm (*id.* at 9a-10a). Therefore, the court enjoined (i) the Trustee and representatives of affected employees from entering into negotiations respecting a labor protection agreement; (ii) the Commission from considering the imposition of any such agreement; and (iii) the Secretary of Transportation from guaranteeing any loans or obligations of the Rock Island under the Rock Island Act (*id.* at 13a-14a). On June 20, 1980, the court denied a motion for reconsideration filed by the Railway Labor Executives' Association ("RLEA"), the United States and the Commission, again explaining that the labor protection provisions of the Rock Island Act constituted an unconstitutional taking (*id.* at 18a-19a).

Because the district court had interrupted the procedures established by the Act before a labor protection plan could be devised, an expedited appeal to the Seventh Circuit, as contemplated by Congress, could not be taken.[1] Therefore, RLEA, the United

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[1] The judicial review provisions of Section 106(d) covered appeals of orders entered under Sections 106(b) and (c),

States, and the Commission filed notices of appeal to this Court pursuant to 28 U.S.C. 1252. RLEA, supported by the United States and the Commission, sought a stay of the preliminary injunction from Mr. Justice Stevens in order to allow the procedures mandated by the Rock Island Act to go forward pending a determination of its constitutionality. On June 28, 1980, Mr. Justice Stevens denied the application. *Railway Labor Executives' Association* v. *Gibbons*, No. A-1135. Mr. Justice Stevens stated that the district court was "probably correct" in finding that the labor protection provisions of the Rock Island Act would constitute a taking of the estate's property. Slip op. 5. Moreover, Mr. Justice Stevens rejected the argument that the estate would suffer no irreparable harm if labor protection payments were made and the Rock Island Act were later determined to constitute a taking, because he doubted that the creditors would have a remedy against the government by a suit in the Court of Claims under the Tucker Act, 28 U.S.C. 1491: "[W]hile the Solicitor General suggests that a Tucker Act remedy *may* exist in the event of an unconstitutional taking, * * * it is obvious that his suggestion is equivocal" (slip op. 4-5).[2] The application for a stay was then resubmitted to the full Court, which denied the request on July 2, 1980, by a 5-3 vote.

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which did not come into play until a labor protection plan was devised.

[2] The language of Section 110(e) of the Rock Island Act, 94 Stat. 403, suggested the possibility that Congress intended to withdraw the Tucker Act remedy for claims regarding these labor protection payments. See *Railway Labor Executives' Association* v. *Gibbons*, *supra*, slip op. 2.

3. In response to the district court's injunction, Congress passed the Staggers Rail Act of 1980, Pub. L. No. 96-448, which was signed into law on October 14, 1980. Section 701 of the Staggers Rail Act (App. A, *infra*, 1a-4a) amended the Rock Island Act in a number of significant respects. Section 701 re-enacted the provisions of Section 106 requiring the Trustee to negotiate a labor protection agreement. However, the time for the parties to negotiate the agreement was shortened from 10 to five days, and the time for the Commission to impose a fair and equitable arrangement, in the absence of an agreement, was shortened from 30 to 15 days.

The judicial review provisions of Section 106(d) were also changed. The amended section no longer includes the prohibition against staying orders of the Commission or the bankruptcy court issued under the Rock Island Act or the bar to further review of the Seventh Circuit's decision. Moreover, the Staggers Rail Act added a new Section 124 to the Rock Island Act. This Section closed the jurisdictional loophole that had prevented the district court's decision from being appealed expeditiously to the Seventh Circuit, by providing that "[n]otwithstanding any other provision of law, any appeal from * * * any decision of the bankruptcy court with respect to the constitutionality of any provision of [the amended Rock Island] Act" must be taken to the Seventh Circuit, sitting en banc, and must be decided within 60 days.

The most significant change made by the Staggers Rail Act, however, was the addition of language clarifying Congress' intention that monies paid out by the estate could be recovered from the United States in the event that the employee protection provisions of the Rock Island Act were held to be a taking. Thus,

Section 110(e) of the Rock Island Act was amended to make explicit that the $75 million payment ceiling was a limitation on the liability of the United States to the employees of the railroad, not to the estate. And Section 124(c) was added to the Rock Island Act, providing:

> Nothing in this Act or in the Milwaukee Railroad Restructuring Act (45 U.S.C. 901 et seq.) shall limit the right of any person to commence an action in the United States Court of Claims under section 1491 of title 28, United States Code (commonly referred to as the Tucker Act).

4. On October 6, 1980, in light of the new statute, RLEA, and the United States, supported by the Commission, moved the district court to vacate its injunction of June 9, 1980.[3] The movants argued that the June 9 injunction applied to a statute no longer in existence and that the injunction had no application to the re-enacted, but nevertheless new and distinct, obligations concerning labor protection that the Staggers Rail Act imposed on the Commission and the other parties. In short, RLEA and the government contended that the passage of the Staggers Rail Act effectively mooted the June 9 injunction. Moreover, the movants argued that the Staggers Rail Act amendments eliminated the features of the original Rock Island Act that the district court had concluded would lead to irreparable injury unless enjoined—particularly by expressly providing that a Tucker Act remedy is available if the labor protection provisions are ultimately found to effect a taking

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[3] Although the Staggers Rail Act did not become law until October 14, 1980, the district court held a hearing on the motion on October 7, 1980 (see App. B, *infra*, 5a-8a), on the expectation that the President would sign the bill.

of property—and therefore that the procedures established in the Staggers Rail Act should be permitted to go forward.

On October 15, 1980, the district court denied the motion to vacate and issued a new injunction preventing the Commission, the Trustee and the Secretary of Transportation from taking any action respecting the labor protection provisions of the "Rock Island Act as amended and re-enacted by the Staggers Rail Act" (App. C, *infra*, 12a-13a). The court held that the "Staggers Rail Act does not cure the defects found in the Rock Island Act" (*id.* at 11a) and that "[t]he Rock Island Act as amended and re-enacted by the Staggers Rail Act effects an unconstitutional taking of private property" (*id.* at 12a). The Staggers Rail Act did not eliminate the likelihood of irreparable injury to the estate, in the court's view, because (*id.* at 11a-12a):

> The imposition of a $75,000,000 uncertainty on the estate will totally halt the liquidation for the long period consumed by the appellate process, with irreparable injury to the already long-suffering creditors. Further, the whole liquidation plan will be distorted by the brooding omnipresence of a potential liability representing a significant percentage of the total assets.

The court's order did not discuss the effect of the express provision of a Tucker Act remedy on the irreparable harm question. On October 16, 1980, the court *sua sponte* entered an order (App. D, *infra*, 14a) amending its order of the previous day by changing the phrase "the court orders the issuance of a preliminary injunction," which appears twice, to "the court orders the continuance of the preliminary injunction."

On October 16, 1980, the RLEA, and on October 29, 1980, the United States and the Interstate Commerce Commission, filed notices of appeal to the Seventh Circuit from the preliminary injunction issued on October 15, 1980.[4] The appeals were docketed as No. 80-2487, *In the Matter of: Chicago, Rock Island & Pacific Railroad Company.* The briefs on the merits of the appeal have been filed, and oral argument was held before the court, sitting en banc, on November 13, 1980.

On October 25, 1980, the Trustee filed a motion to dismiss the appeals to the court of appeals for lack of jurisdiction, arguing that because a direct appeal of the June 9, 1980, preliminary injunction had been taken to this Court pursuant to 28 U.S.C. 1252, jurisdiction over the appeal of the October 15, 1980, injunction must also lie in this Court. On October 30, 1980, the Trustee filed a petition for a writ of certiorari, asking this Court to review and affirm the district court's order of October 15, 1980, prior to judgment by the court of appeals. *William M. Gibbons, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor, et al.* v. *Railway Labor Executives' Association, et al.*, No. 80-704.

ARGUMENT

For the reasons stated by appellant (J.S. 8-17), the government believes that the jurisdictional statement raises a substantial federal question. However, because the Staggers Rail Act has effectively super-

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[4] Because the district court's order was a determination of the constitutionality of the Rock Island Act, as amended, Section 124(a) of that statute (App. A, *infra*, 1a) requires that the order be appealed to the Seventh Circuit.

seded the provisions of the Rock Island Act addressed by the June 9, 1980, injunction that is the subject of this appeal, the controversy raised by the appeal is now moot. Accordingly, the Court should note probable jurisdiction, vacate the judgment of the district court, and remand with directions to dismiss. *United States* v. *Munsingwear*, 340 U.S. 36, 39 (1950).

The injunction that appellant has asked this Court to review was entered by the district court on June 9, 1980, on the ground that the Rock Island Act, as originally enacted, was unconstitutional. With the passage of the Staggers Rail Act, the original Rock Island Act effectively has been repealed. The question presented by this appeal thus is purely an academic one—the constitutionality of a statute that no longer exists and that has no continuing consequences.

Of course, the Staggers Rail Act has replaced the original Rock Island Act with an amended version that still provides procedures for implementing a labor protection plan. But there is no merit to the district court's suggestion that these amendments to the Rock Island Act are merely "cosmetic" (App. B, *infra*, 6a). The district court's primary constitutional objection to the original Rock Island Act was that it constituted a taking without just compensation in violation of the Fifth Amendment. The court also intimated that possible constitutional problems were posed by the "strangely truncated appellate procedure" (J.S. App. 7a). These objections have been remedied completely by the recent amendments to the statute. The appellate procedure has been altered by the elimination of both the anti-stay provision and the limitation on further review following a decision by the Seventh Circuit. More important, by including a Tucker Act remedy, the new Rock Island Act expressly provides

for the recovery of just compensation for any taking that may occur as a result of the operation of the statute.[5] Accordingly, the controversy that is presented in this appeal and that forms the basis for the June 9, 1980, injunction has been mooted by the intervening legislation. "Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly." *United States* v. *Alaska Steamship Co.*, 253 U.S. 113, 116 (1920); cf. *Zablocki* v. *Redhail*, 434 U.S. 374, 382 n.9 (1978) (case not moot because new statute did not remove possibility that statute at issue would still apply).

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[5] Congress clearly indicated that this amendment was intended to cure the problems that had led to the issuance of the June 9, 1980, injunction. The Conference Report stated:

> The House amendment clarifies the Rock Island Transition and Milwaukee Railroad Restructuring Act to state affirmatively that nothing in these Acts shall limit the right of any person to bring an action under the Tucker Act. This provision was not in the original Acts on the grounds that there continued to exist a Tucker Act remedy where Congress has not explicitly waived such a remedy. See Regional Rail Reorganization Cases, 419 U.S. 102, 125 (1974). However, in reviewing Judge Garr's [*sic*] injunction of the Rock Island Transition Act, Justice Stevens expressed concern about the availability of such a remedy where [*sic*] the injunction to be lifted and were the Act subsequently to be held unconstitutional, —— U.S. —— (1980). This specific provision clearly establishes that the Tucker Act is available and nothing in these Acts limits the right of any person to seek redress under the Tucker Act.

H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 137 (1980), *reprinted in* 126 Cong. Rec. H9931 (daily ed. Sept. 29, 1980).

In light of the mooting of this appeal by the passage of the Staggers Rail Act, this Court should note probable jurisdiction, vacate the judgment below and remand with directions to dismiss. *United States* v. *Munsingwear, supra,* 340 U.S. at 39-40 & n.2; *United States* v. *Alaska Steamship Co., supra,* 253 U.S. at 116; see also *Great Western Sugar Co.* v. *Nelson,* 442 U.S. 92, 94 (1979); *New Orleans Flour Inspectors* v. *Glover,* 161 U.S. 101, 103 (1896). There exists, of course, a separate question (not presented here) of the constitutionality of the new Rock Island Act, as amended by the Staggers Rail Act. This question was addressed by the district court in its October 15, 1980, order, and that order is now being reviewed by the Seventh Circuit, according to the mandate of Section 124(a) of the amended Rock Island Act, with a decision due by December 28, 1980.[6] When the court of appeals' decision is rendered, it will be subject to review by this Court. The district court's failure to vacate its June 9 order, however, has formed the basis for the Trustee's contention, incorrect in our view, that the Seventh Circuit lacks jurisdiction to hear the appeal now pending there. Vacating the June 9 injunction will eliminate the uncertainty concerning the proper avenue of appeal and will permit

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[6] The district court's belated effort to characterize the October 15, 1980, order as merely a "continuance" of the earlier injunction (App. D, *infra,* 14a) does not alter the fact that a new order was entered. As the court recognized in the text of the injunction (App. C, *infra,* 12a-13a), the Staggers Rail Act imposed new obligations on the parties that required a new injunction. Obviously, the June 9 order could not have enjoined the parties from performing obligations under a statute not yet in existence. This new order is clearly a decision "with respect to the constitutionality of" the new Rock Island Act, and therefore any appeal of the order must be taken to the Seventh Circuit under Section 124(a).

the merits of the constitutionality of the Rock Island Act, as amended by the Staggers Rail Act, to be resolved expeditiously in the manner prescribed by Congress.

CONCLUSION

This Court should note probable jurisdiction, vacate the judgment below and remand with directions to dismiss as moot.

Respectfully submitted.

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NOVEMBER 1980

APPENDIX A

The Staggers Rail Act of 1980, Pub. L. No. 96-448 (Oct. 14, 1980), provides in pertinent part:

TITLE VII—MISCELLANEOUS PROVISIONS

ROCK ISLAND AND MILWAUKEE RAILROADS AMENDMENTS

SEC. 701. (a)(1) The Rock Island Railroad Transition and Employee Assistance Act (45 U.S.C. 1001 et seq.) is amended by redesignating section 124 as section 125 and by inserting immediately after section 123 the following new section:

"JUDICIAL REVIEW

"SEC. 124. (a) Notwithstanding any other provision of law, any appeal from—

"(1) any decision of the bankruptcy court with respect to the constitutionality of any provision of this Act; and

"(2) any decision of the court having jurisdiction over the reorganization of the Milwaukee Railroad with respect to the constitutionality of the Milwaukee Railroad Restructuring Act (45 U.S.C. 901 et seq.), shall be taken to the United States Court of Appeals for the Seventh Circuit.

"(b) If appeals are taken from decisions described in subsection (a) of this section involving section 106 or 110 of this title or section 9 or 15 of the Milwaukee Railroad Restructuring Act, the court of appeals shall determine such appeals in a consolidated proceeding, sitting en banc, and shall render a final decision no later than 60 days after the date the last such appeal is filed.

"(c) Nothing in this Act or in the Milwaukee Railroad Restructuring Act (45 U.S.C. 901 et seq.) shall limit the right of any person to commence an action in the United States Court of Claims under section 1491 of title 28, United States Code (commonly referred to as the Tucker Act)".

(2) Section 110(e) of the Rock Island Railroad Transition and Employee Assistance Act (45 U.S.C. 1008(e)) is amended by inserting "to employees" immediately after "liability".

(3) Section 15(e) of the Milwaukee Railroad Restructuring Act (45 U.S.C. 914(E)) is amended by inserting "to employees" immediately after "liability".

(b)(1) Section 106 of the Rock Island Railroad Transition and Employee Assistance Act (45 U.S.C. 1005) is amended to read as follows:

"EMPLOYEE PROTECTION AGREEMENTS

"SEC. 106. (a) No later than 5 days after the date of enactment of the Staggers Rail Act of 1980, in order to avoid disruption of rail service and undue displacement of employees, the Rock Island Railroad and labor organizations representing the employees of such railroad with the assistance of the National Mediation Board, may enter into an agreement providing protection for employees of such railroad who are adversely affected as a result of a reduction in service by such railroad. Such employee protection may include, but need not be limited to, employee relocation incentive compensation, moving expenses, and separation allowances.

"(b) If the Rock Island Railroad and the labor organizations representing the employees of such rail-

road are unable to enter into an employee protection agreement under subsection (a) of this section within 5 days after the date of enactment of the Staggers Rail Act of 1980, the matter shall be immediately submitted to the Commission. The Commission shall impose upon the parties by appropriate order a fair and equitable arrangement with respect to employee protection no later than 15 days after the date of enactment of the Staggers Rail Act of 1980, unless the Rock Island Railroad, and the authorized representatives of its employees have by then entered into a labor protection agreement. For purposes of this subsection, the term 'fair and equitable' means no less protective of the interests of employees than protection established by and pursuant to section 9 of the Milwaukee Railroad Restructuring Act (45 U.S.C. 908), subject to the limitations set forth in section 110 of this title.

"(c) If an employee protection arrangement is imposed by the Commission under subsection (b) of this section, the bankruptcy court shall immediately authorize and direct the Rock Island Railroad trustee to, and the Rock Island Railroad trustee and the labor organizations representing the employees of the railroad shall, immediately implement such arrangement.

"(d) Any order of the Commission under subsection (b) of this section and any order of the bankruptcy court under subsection (c) of this section may be appealed only to the United States Court of Appeals for the Seventh Circuit. Any such appeal to such court of appeals shall be filed within 5 days after the date of entry of the order of the Commission or the bankruptcy court, as the case may be, and such court of appeals shall finally determine such

appeal within 60 days after the date such appeal is filed.

"(e)(1) Any claim of an employee for benefits and allowances under an employee protection agreement or arrangement entered into under this section shall be filed with the Board in such time and manner as the Board by regulation shall prescribe. The Board shall determine the amount for which such employee is eligible under such agreement or arrangement and shall certify such amount to the Rock Island Railroad for payment.

"(2) Benefits and allowances under such agreement or arrangement entered into this section shall be paid by the Rock Island Railroad from its own assets or in accordance with section 110 of this title, and claims of employees for such benefits and allowances shall be treated as administrative expenses of the estate of the Rock Island Railroad.

"(f) The first sentence of section 7(b)(7) of the Railroad Retirement Act of 1974 (45 U.S.C. 231f (b)(7)) is amended by striking out "Milwaukee Railroad Restructuring Act" and inserting in lieu thereof ", the Milwaukee Railroad Restructuring Act, and the Rock Island Railroad Transition and Employee Assistance Act.".

APPENDIX B

EXCERPTS FROM THE TRANSCRIPT OF PROCEEDINGS—OCTOBER 7, 1980

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 75 B 2697

In the Matter of:

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, DEBTOR

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause, before the HONORABLE FRANK J. MCGARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Tuesday, October 7, 1980, at the hour of 2:00 o'clock p.m.

* * * *

THE COURT: I think I should make some comments on this.

As has been pointed out, it is in effect, a discussion of problems created by a law that is not yet a law but which will very probably become one soon. For that reason, I think the discussion is appropriate.

What I have before me, to be more precise about it, is motions by three parties to vacate a preliminary injunction, which I entered on June 9th, 1980. I have listened to the arguments on this. I have formed some tentative opinions. I don't really intend to rule on those motions because everybody is entitled to a little more chance to develop the matter with them-

selves and with me, and, of course, we should wait until it becomes a reality. I think these observations of mine are pertinent only because of the suggestion of Mr. Rush that I might find his position so appealing that I would agree now that the Commerce Commission is correct in regarding my former injunctive order as not binding upon them because this is in effect new and different legislation. I want to make my position clear so that there is no misunderstanding between myself and Mr. Rush and/or the Commission.

Actually, as has been adverted to, the basic vice of the Act which I held unconstitutional was the imposition of the cost of the Rock Island Rehabilitation Act on the Estate and thus on the creditors. I issued a preliminary injunction basically because I found the Act unconstitutional and thought it was my duty to enjoin the carrying out of the programs set forth by Congress seeking the unconstitutional goals that I found.

We had discussions of whether a preliminary injunction was issuable, and we discussed the traditional irreparable injury concept that goes with that determination. I did issue the preliminary injunction accompanied by a finding, among other things, that there was irreparable injury. The bill, as I now see it, amends and attempts to cure some of the procedural problems with the Act which was before me in an effort to remove the irreparable injury argument concerning the old Act. The new bill does not address the basic finding of the Court that the whole program which has been changed only cosmetically, to borrow somebody else's word, was an unconstitutional deprivation. I held that and an appeal is in progress. The argument that the Tucker Act is available and there-

fore we could go ahead with the unconstitutional taking because the Tucker Act will allow everything to turn out in the end really does not impress me. I share Mr. Moritz' comment, or argument, that you do not proceed, nor must the Court allow proceedings under what is patently unconstitutional legislation because there is a remedy somewhere down the line that may straighten things out. It really is not at all clear to me that to disperse the money now, to allow the claim against the assets of the Rock Island to accrue, to say to the Trustee that if this is all unconstitutional you can sue under the Tucker Act and get it back, is even to cure the irreparable harm argument. Mr. Murray argued that the very fact of the existence of the $75 million lien on the assets of the Rock Island is irreparable injury as it overshadows the efforts of the Trustee to continue the liquidation process relying, as he must, on the ability and willingness of people to extend credit under cost of administration terms.

So, as I said, my initial impression without ruling on it is that the new bill does not cure the old problem.

Mr. Rush asks me to agree that it is new legislation so that the old injunction, which he has moved to vacate is no longer binding on the Commission, and I would like to make it clear that I do not agree. This is not new legislation in my view. This is amended legislation which attempts, but fails, to clear the underlying flaws which caused me to find the bill unconstitutional in the first place. It remains basically the same law with the same defects and is subject to the same injunction. So, while I am not ruling on the motion to vacate the injunction because I would like the parties to have an opportunity to

develop the matters as fully as they wish before me, I am making these comments to make it clear that I do not agree with the Commerce Commission's suggestions that the injunction is no longer binding on them.

I think what we had better do, gentlemen, is to allow the various people opposing the motion to file some very quick responses, and then give Justice, the Commerce Commission and Mr. Clarke an opportunity to reply so that they will have a chance to air their views on it.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 B 2697

In the Matter of

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, DEBTOR,

WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; and HENRY CROWN, ET AL., PLAINTIFFS,

v.

THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, DEFENDANTS.

PRELIMINARY INJUNCTION

This matter is before the court on the motion of intervenor Railway Labor Executives Association ("RLEA"), requesting this court [to] vacate the preliminary injunction issued on June 9, 1980, enjoining enforcement of sections 106 and 110 of the Rock Island Transition and Employee Assistance Act ("Rock Island Act" or the "Act"), 45 U.S.C. §§ 1005, 1008, on the grounds that all constitutional defects have been remedied by passage of the Railroad Trans-

portation Policy Act of 1980 ("Staggers Rail Act of 1980"), H.R. Rep. 1430, 126 Cong. Rec.-House 9892 (Sept. 29, 1980). The trustee and certain creditors also seek a declaratory judgment and injunctive relief declaring the Rock Island Act as amended by the Staggers Rail Act, unconstitutional and enjoining its enforcement. In anticipation that the Staggers Rail Act would be signed into law, the court heard arguments on October 7, 1980, from all interested parties, addressed to the effect of the Staggers Rail Act on the court's preliminary injunction.

This court issued a preliminary injunction on June 9, 1980, when, based upon findings of fact and conclusions of law delivered from the bench, the court concluded that "the probability of determination of unconstitutionality of this Act after more mature consideration and deliberation is exceedingly great. . . ." Transcript of Proceedings, June 9, 1980 at 81. Specifically, the injunction prevented the Interstate Commerce Commission and the Secretary of Transportation from imposing a $75,000,000 loan with cost of administration status on the bankrupt estate. These proceeds were to fund a labor protection arrangement created under the Act. This determination was based upon the court's finding that the provisions of the Act mandated a taking of private property of the estate without compensation, in violation of the fifth amendment.

On June 28, 1980, United States Justice John Paul Stevens denied RLEA's motion for a stay of this court's injunction.

The Staggers Rail Act became law on October 14, 1980. It amends certain provisions of the Rock Island Act and re-enacts the labor protection obligations previously found unconstitutional by this court.

The re-enacted labor protection requirements appear to be essentially the same as under the original Act except that the time available for the trustee and the Commission to respond is shortened and the anti-stay provisions of section 106 have been eliminated.

This court has studied the Staggers Rail Act amendments to the Rock Island Act, has reviewed carefully the arguments of counsel, the documents filed by the various parties, the ruling of June 9, 1980, and the court's knowledge of these proceedings, and it remains clear that the Rock Island estate continues to be exposed to irreparable injury by the provisions of the Rock Island Act as amended by the Staggers Rail Act. The Staggers Rail Act does not cure the defects found in the Rock Island Act. Like its predecessor, the Staggers Rail Act imposes a $75,000,000 cost of administration claim on the Rock Island estate with priority over claims of general creditors and shareholders on the assets of the estate.

Petitioner argues that the statutory scheme can be implemented, the money disbursed, and the validity of the program and extent of the Rock Island liability to finance it, later litigated. This, in fact, cannot be done without irreparable injury to the administration of the estate for the benefit of the creditors. The trustee is currently liquidating assets and preparing the plan for distribution to creditors. Under court order, the trustee is also preparing an interim plan for the immediate partial satisfaction of cost of administration claims. The imposition of a $75,000,000 uncertainty on the estate will totally halt the liquidation for the long period consumed by the appellate process, with irreparable injury to the already long-suffering creditors. Further, the whole liquidation plan will be distorted by the brooding omnispres-

ence of a potential liability representing a significant percentage of the total assets.

Pursuant to the requests for relief in the written filings and arguments of counsel, the court orders the issuance of a preliminary injunction.

1) The Rock Island Act as amended and re-enacted by the Staggers Rail Act effects an unconstitutional taking of private property in violation of the rights of the Rock Island estate, its creditors and shareholders which are secured by the Fifth Amendment of the United States Constitution.

2) The implementation of this Act will constitute irreparable harm to the estate.

3) The court's injunction of June 9, 1980 remains in full force and applies to sections 106 and 110 of the Rock Island Act, as amended and re-enacted by the Staggers Rail Act.

4) The court orders the issuance of a preliminary injunction:

a) preliminarily enjoining the Interstate Commerce Commission from asserting jurisdiction to consider or to impose any labor protection arrangement or obligation under the Rock Island Act as amended and re-enacted by the Staggers Rail Act; and

b) preliminarily enjoining the trustee, William M. Gibbons, from entering into negotiations respecting any labor protection agreement and from implementing any labor protection agreement under the Rock Island Act as amended and re-enacted by the Staggers Rail Act; and

c) preliminarily enjoining the United States Secretary of Transportation from requesting, approving or guaranteeing any loan or obligation on the estate of the Chicago, Rock Island and

Pacific Railroad Company under the provisions of the Rock Island Act as amended and re-enacted by the Staggers Rail Act.

ENTER:

FRANK J. MCGARR
United States District Judge

DATED: October 15, 1980

APPENDIX D

ORDER OF THE UNITED STATES DISTRICT COURT

OCTOBER 16, 1980

The Preliminary Injunction entered October 15, 1980 is hereby corrected as follows:

1) p. 1 [9a], lines 1 and 2 should read: "This matter is before the court on the motion of intervenor Railway Labor Executives Association ('RLEA'), joined by the United States and the Interstate Commerce Commission, requesting this court. . . ."

2) p. 3 [11a], line 13 [18] should read: ". . . Island estate with priority over claims of creditors and. . . ."

3) p. 4 [12a], line 4 should read: ". . . arguments of counsel, the court orders the continuance of the preliminary. . . ."

4) p. 4 [12a], line 16 [18] should read: "4) The court orders the continuance of the preliminary injunction: . . ."

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